46 Am. Jur. 2d Judges § 168

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Judges

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IX. Disqualification to Act in Particular Case

C. Remedies and Procedure

2. Time for Objection

§ 168. Time requirements for objecting to judge

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 51(2)

A.L.R. Library

Time for asserting disqualification of judge, and waiver of disqualification, 73 A.L.R.2d 1238

Absent extraordinary circumstances,[1] an objection to a judge must be raised at the earliest possible moment,[2] after learning of the grounds for the judge's recusal.[3] The issue of judicial disqualification is timely if submitted at the earliest practicable opportunity after the disqualifying facts are discovered.[4] A defendant cannot be required to file a motion for substitution for cause prior to the alleged bias.[5]

The requirement that a motion to recuse be filed promptly is intended to promote judicial economy, that is, to ensure that long and costly proceedings before a disqualified judge are avoided.[6] The timeliness requirement with respect to a motion for recusal prevents the concealment of an ethical issue in order to create a strategic advantage and prevents the waste of judicial resources and prejudice to the nonmovants.[7] Timeliness is essential in filing a motion to disqualify a trial judge because delay imposes unnecessary disruption on both the judicial system and the litigants and it necessarily results in significant additional costs to the parties.[8] A party may not take chances with a judge about whom the party knows of grounds for recusal and then, after such party loses, file a motion for recusal.[9]

The requirement of a timely filing is one of substance and not merely one of form.[10] Only a timely filed recusal motion triggers a judge's duty to recuse or to refer the motion to another judge.[11]

The basis of requiring a timely objection is that courts disfavor allowing a party to shop for a new judge after determining the original judge's disposition toward the case.[12] It would seem intolerable to permit a party to play fast and loose with the administration of justice by deliberately standing by without making an objection of which the party is aware and thereby permitting the proceedings to go to a conclusion which the party may acquiesce in, if favorable, and which the party may avoid, if not.[13]

Some jurisdictions, though, permit the disqualification of a judge to be raised at any time,[14] even on appeal or in a collateral attack.[15] Even so, such motion must be made at the earliest practicable moment.[16]

The determination of whether a motion to recuse is timely is a fact-intensive inquiry.[17] For instance, a motion to remove a superior court judge for prejudice is untimely if it is filed after the judge makes a discretionary ruling in the case and the party moving for disqualification received adequate notice of that ruling.[18] Similarly, a bank forfeited its claim that a judge's independent research on an issue material to a class certification motion amounted to a violation of its due process right to an unbiased judge, by its dilatory conduct in waiting until after a pending motion was decided to present its statement of objection seeking to have the judge disqualified, where the bank opposed the judge's tentative ruling on the class certification motion on the basis that the judge's independent research was improper, but the bank asserted the judge's independent research as a basis for disqualification only after the bank lost on the class certification motion and appellate review thereof failed.[19] However, plaintiffs in an action seeking the defendants' compliance with a conditional use permit and agreement raised the judicial disqualification issue at the earliest practicable opportunity after the disqualifying facts were discovered, and thus the issue was timely, where the plaintiffs' attorney received a letter from the trial judge, while an appeal from the grant of the defendants' cross-motions for summary judgment was pending, in which the judge admitted that disciplinary proceedings against a judge's colleague caused the trial judge to have a personal bias against the plaintiffs' attorney, and the plaintiffs amended their assignments of error to allege that the judge erred in failing to self-recuse from the case.[20]

A judge was required to honor a defendant's peremptory challenge to the judge which was made during the defendant's initial appearance, even though no judge had formally been assigned to the case; the right of peremptory challenge was designed to protect a litigant against a judge's participation in any stage of proceedings in which actions were taken that could interfere with the right of a defendant to a fair disposition of the case.[21]

CUMULATIVE SUPPLEMENT

Cases:

Motion for recusal filed by town and town board in voting rights case was untimely, even though judge was serving as magistrate judge when they learned of potential conflict, and case was randomly assigned to him after he was appointed district judge, where town and board had expressly waived conflict while judge was magistrate judge and actively participated in heavily-contested litigation, including numerous proceedings before, and submissions to, judge, judge had developed significant familiarity with action, reassignment would most likely lead to assignment to judge entirely unfamiliar with case, and they waited until 14 months after learning of possible conflict and after first judge had issued favorable preliminary injunction decision to file motion. 28 U.S.C.A. §§ 455(a), 455(e). Flores v. Town of Islip, 448 F. Supp. 3d 267 (E.D. N.Y. 2020).

To apply the all purpose assignment rule, as an exception to the general rule for determining the timeliness of a motion to disqualify a judge, two conditions are necessary: first, the method of assigning cases must instantly pinpoint the judge whom

the parties can expect to ultimately preside at trial, and second, that same judge must be expected to process the case in its totality, from the time of the assignment, thereby acquiring an expertise regarding the factual and legal issues involved, which will accelerate the legal process. Cal. Civ. Proc. Code § 170.6(a)(2). Bontilao v. Superior Court, 37 Cal. App. 5th 980, 250 Cal. Rptr. 3d 535 (6th Dist. 2019), review denied, (Oct. 23, 2019).

Father's motion for automatic change of judge was not timely, even if he was not served with notice of proceedings, in action by grandparents for guardianship of children, where father's appearance at hearing started limitations period, and father did not file motion within 30 days of making appearance. Blankenship v. Duke, 132 N.E.3d 410 (Ind. Ct. App. 2019).

Capital defendant waived his claim for recusal of trial judge, who had previously represented defendant as public defender, by filing untimely motion, where defendant moved for recusal five days into rape and murder trial, judge had presided over case for more than six years up to that point, and defendant should have been made aware of prior representation, either through his own recollection or through judge's acknowledgements throughout proceedings. White v. Commonwealth, 544 S.W.3d 125 (Ky. 2017).

Mother failed to preserve for appeal her challenge to trial judge's being assigned to continue hearing the case after judge's retirement, in proceeding to terminate parental rights, where mother failed to raise any complaint with regard to judge's assignment or judge's ability to hear the case. In Interest of S.L.W., 529 S.W.3d 601 (Tex. App. Texarkana 2017), review denied, (Nov. 3, 2017).

Pursuant to statute providing that party may request to substitute judge before hearing of any preliminary contested matters but not later than 60 days after summons and complaint are filed, party's request is timely if it is made before judge in fact hears substantive issue that goes to ultimate merits of case. Wis. Stats. § 801.58(1). In re Commitment of Matthews, 2021 WI 42, 397 Wis. 2d 1, 959 N.W.2d 640 (2021).

[END OF SUPPLEMENT]

Footnotes

1 State v. D'Ambrosio, 67 Ohio St. 3d 185, 1993-Ohio-170, 616 N.E.2d 909 (1993).

2 In re Steward, 828 F.3d 672 (8th Cir. 2016).
As to timeliness of objection in federal court, see Am. Jur. 2d, Federal Courts § 49.
As to waiver of disqualification, generally, see §§ 198 to 208.

3 Com. v. Rivera, 473 Mass. 1003, 39 N.E.3d 732 (2015).

4 State v. Buttercase, 296 Neb. 304, 893 N.W.2d 430 (2017).

5 People v. Jones, 197 Ill. 2d 346, 258 Ill. Dec. 775, 757 N.E.2d 464 (2001).

6 Pyatt v. State, 298 Ga. 742, 784 S.E.2d 759 (2016).

7 State v. Dunsmore, 2015 MT 108, 378 Mont. 514, 347 P.3d 1220 (2015).

8 Camco Const., Inc. v. Utah Baseball Academy, Inc., 2010 UT 63, 243 P.3d 1269 (Utah 2010).

9 Doe v. Rankin Medical Center, 195 So. 3d 705 (Miss. 2016).
A defendant cannot take chances with a judge and then, if the defendant thinks that the sentence is too severe, secure a disqualification and a hearing before another judge. State v. Dunsmore, 2015 MT 108, 378 Mont. 514, 347 P.3d 1220 (2015).
A party, knowing of a ground for requesting disqualification, cannot be permitted to wait and decide whether the party likes the subsequent treatment the party receives. Appeal of the Local Government Center, Inc., 165 N.H. 790, 85 A.3d 388 (2014).

10 Mace v. Nocera, 2004 WY 154, 101 P.3d 921 (Wyo. 2004).

11 De Leon v. Aguilar, 127 S.W.3d 1 (Tex. Crim. App. 2004).

12 Office of Disciplinary Counsel v. Au, 107 Haw. 327, 113 P.3d 203 (2005), reconsideration filed, (July 5, 2005); Bowman v. Ottney, 2015 IL 119000, 400 Ill. Dec. 640, 48 N.E.3d 1080 (Ill. 2015).

13 Tri Counties Bank v. Superior Court, 167 Cal. App. 4th 1332, 84 Cal. Rptr. 3d 835 (5th Dist. 2008).

14 Chambers v. State, 167 S.W.3d 534 (Tex. App. Fort Worth 2005), petition for discretionary review refused, (2 pets.) (Oct. 5, 2005).

15 In re Gonzalez, 115 S.W.3d 36 (Tex. App. San Antonio 2003).

16 People v. Breitweiser, 38 Ill. App. 3d 1066, 349 N.E.2d 454 (2d Dist. 1976).

17 Hudson v. Texas Children's Hosp., 177 S.W.3d 232 (Tex. App. Houston 1st Dist. 2005).

18 In re Welfare of R.S.G., 174 Wash. App. 410, 299 P.3d 26 (Div. 2 2013).

19 Tri Counties Bank v. Superior Court, 167 Cal. App. 4th 1332, 84 Cal. Rptr. 3d 835 (5th Dist. 2008).

20 Tierney v. Four H Land Co. Ltd. Partnership, 281 Neb. 658, 798 N.W.2d 586 (2011).

21 Smith v. State, 887 P.2d 979 (Alaska Ct. App. 1994).

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